# STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 95B178

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## INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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DANIEL A. KIRSCH,

Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Respondent.

<u>.</u>

Hearing in this matter commenced and concluded on July 26, 1995. Complainant appeared in person and represented himself. Respondent appeared through Paul R. Daraghy, director of the Health Facilities Division, Department of Public Health and Environment ("DPHE"), and was represented by Joyce K. Herr, assistant attorney general.

Respondent called Paul R. Daraghy, Shirley Collins, human resources specialist with DPHE, and Complainant Daniel A. Kirsch as witnesses. Complainant Daniel Kirsch testified in his own behalf.

Respondent's exhibits 1 through 7 were admitted without objection.

# MATTER APPEALED

Complainant appeals the termination of his employment due to willful misconduct, using a state credit card for personal gain, and conviction of a misdemeanor charge of theft.

## **ISSUES**

- 1. Whether the decision to terminate complainant's employment was within the realm of alternatives available to a reasonable manager.
- 2. Whether either party is entitled to an award of attorney fees and costs.

### FINDINGS OF FACT

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- 1. Complainant Daniel Kirsch was employed by the Health Facilities Division as an administrative clerk from April 25, 1993 to July 12, 1995. (exhibits 4 and 5).
- 2. Kirsch had worked for the Department of Public Health and Environment in the Division of Disease Control and Epidemiology from September, 1981 through December 11, 1992. (exhibits 1 and 3). His employment as an administrative clerk with the Division of Disease Control and Epidemiology was terminated for willful misconduct involving the breach of confidentiality regarding HIV testing results.
- 3. On April 1, 1993, an administrative law judge issued an initial decision overturning the termination and reinstating Kirsch, finding that the Division's policy on disclosure of negative HIV test results had not been put into evidence. The only policy in evidence was set forth in statute. The ALJ found that the statute had not been violated. (exhibit 1).
- 4. DPHE appealed the initial decision to the State Personnel Board. However, during the pendency of the appeal, the department reinstated Kirsch to the position of administrative clerk and transferred him to the Health Facilities Division on April 25, 1993. (exhibits 4 and 5).
- 5. On September 24, 1993, the Board overturned the initial decision of the administrative law judge and upheld the termination of Kirsch's employment. (exhibit 2). DPHE allowed Kirsch to continue his employment.
- 6. As an administrative clerk in the Health Facilities Division, Kirsch was assigned various duties, one set of duties involved management of the vehicles assigned to the department. Kirsch had control of the department vehicles and scheduled those cars to department employees for use on official business. As part of these duties Kirsch had access to state credit cards to be used to purchase gasoline for state vehicles.
- 7. Kirsch was aware that state credit cards were to be used only for purchase of gasoline for state vehicles. However, beginning in the summer of 1994, on 10 12 occasions, occurring on average about every week and a half to two weeks, Kirsch used state credit cards to buy gasoline for his personal vehicle. He would take a state credit card overnight, buy gas for his car and return the card the next day. Kirsch bought about \$125 in gasoline for personal use on the state credit card.
- 8. Kirsch's then girlfriend asked him if she could use the state credit card to buy gas for her vehicle. He gave her a state credit card and told her to sign his name on the slip.

- 9. The gas station owner became suspicious that a woman was signing her name as "Daniel Kirsch" and that the state credit card was being used for personal purposes. The owner contacted the state motor vehicle pool and reported his suspicions. These suspicions were in turn reported to the Health Facilities Division.
- 10. Because the division has control of federal Medicaid funds, Paul Daraghy contacted the Attorney General's Medicaid Fraud Control Unit and requested an investigator be assigned to the case.
- 11. After investigation, the case was referred to Denver County Court where Kirsch pled guilty to a misdemeanor theft charge in February, 1995. As part of the plea agreement he reimbursed the state for the \$125 of gasoline he had charged to the state credit card.
- 12. On June 7, 1995, an informational meeting pursuant to Board rule 8-3-3 was held between Daraghy and Kirsch. Kirsch admitted that he was aware that state credit cards were to be used only for official purposes and that he had wrongfully used the state credit card for his personal use on various occasions.
- 13. As a result of the investigation, the 8-3-3 meeting and Kirsch's admissions, Daraghy decided to terminate Kirsch's employment. In reaching this decision, Daraghy considered the division's fiduciary obligation in the use of funds, Kirsch's employment record, his previous reinstatement after a serious breach, and the risk that such a breach of trust might again occur.
- 14. Kirsch's employment was terminated on June 12, 1995. He appealed to the State Personnel Board on June 16.

# **DISCUSSION**

The burden of proof is upon the agency to show by a preponderance of the evidence that Kirsch committed the actions alleged, use of a state credit card for personal gain. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Kirsch admitted numerous times in his testimony and in his closing statement that he was aware that state credit cards were not for personal use and that his personal use of the card was prohibited.

The evidence and admissions presented show Kirsch engaged in the unauthorized use of a state credit card on 10 - 12 occasions over a period of 3 - 5 months. This shows a serious lapse of fiduciary responsibility on his part. Given Kirsch's previous

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breach of conduct, the appointing authority was well within the parameters of managerial discretion in terminating his employment. The Board will not substitute its judgment for that of the appointing authority.

Although the action of the appointing authority is upheld, the complainant did not institute his appeal in bad faith or in any of the grounds specified in section 24-50-125.5, C.R.S. (1988 Supp. 10B) which would justify an award of attorney fees and costs. Sena v. Department of Institutions, State Personnel Board case number 93B029.

## CONCLUSIONS OF LAW

- 1. The termination of complainant's employment for the admitted fraudulent use of state credit cards for his own personal use was within the realm of alternatives available to a reasonable administrator.
- 2. Respondent is not entitled to an award of attorney fees or costs.

### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_ day of July, 1995, at Denver, Colorado.

Mary Ann Whiteside Administrative Law Judge

# **NOTICE OF APPEAL RIGHTS**

### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$140.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

# **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

# ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

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# **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

## **CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_ day of August, 1995, I sent true copies of the foregoing INITIAL DEICSION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Daniel A. Kirsch 1121 Albion St., #805 Denver, CO 80220

and to the respondent's representative in the interagency mail, addressed as follows:

Joyce K. Herr Department of Law Human Resources Section 1525 Sherman St., 5th Floor Denver, CO 80203